

**THE LABOR COMMISSION
WORKERS' COMPENSATION ADVISORY COUNCIL**

**Wednesday, September 26, 2007 - 12:00 P.M.
Room 319, Heber Wells Building
160 East 300 South
Salt Lake City, Utah**

The following Advisory Council members were in attendance:

Thomas Bingham, President, Utah Manufacturers Association
David Bird, Esq.
K. Dawn Atkin, Esq.
Dennis Lloyd, representing Lane Summerhays, CEO, Workers Compensation Fund
Ralph Astorga, President USWA Local 392
Reo Castleton, SL County Fire Department
James V. Olsen, President, Utah Food Industry Association
Richard J. Thorn, President/CEO, Associated General Contractors - Utah Chapter
Brian Kelm, Esq.
Edward Holmes, M.D., RMCOEH
Kim Moulton, Mgr. Medical Services, Kennecott Corporation
Brad Tibbitts, Property & Casualty Director, Utah State Insurance Department

Legislative Liaison present:

Sen. Ed Mayne, AFL-CIO

Others Present:

Alan Hennebold - Deputy Labor Commissioner
Joyce A. Sewell - Labor Commission
Robyn Barkdull - Labor Commission
Richard LaJeunesse - Labor Commission
Debbie Hann - Labor Commission
Dr. Alan Colledge - Labor Commission
Dr. Scott DeBerard - Utah State University
Karla Rush - Labor Commission
Scott Squire - Attorney
Lorraine Mayne - Milliman, Inc.

WELCOME

Deputy Commissioner Hennebold brought the meeting to order at 12:00 p.m.

1. Approval of Minutes -

Ralph Astorga moved that the minutes of the June 20, 2007 meeting be approved. **Dawn Atkin** seconded the motion which passed unanimously.

2. Actuarial Study for UEF and ERF

Lorraine Mayne from Milliman, Inc. addressed this agenda item. **Ms. Mayne** pointed out that the handouts were drafts only and that full actuarial reports for each fund, including a description of methods, assumptions, and results would be given to the Commission in the near future. She explained

that Milliman's purpose was twofold: projecting the liabilities of each fund at the end of the fiscal year; and recommending an assessment rate to insure that both funds could meet those liabilities. She then explained this year's projections.

Ms. Mayne explained that the overall premium base had an increase of 14.9% from 2005 to 2006. The projected amount for calendar year 2006 was \$611.4 million and the actual base revenue was \$631.1 million. She said their best estimate of the projection for 2007 was an increase of 2.46% making the base \$646.6 million.

The Employers' Reinsurance Fund (ERF) had revenue 11.3 % higher than projected due to higher premium tax revenue. Disbursements were 3.2% lower than projected due to continuing decrease in new claimants. Revenue exceeded the disbursements by \$31 million in FY07. With this information, they are recommending that the 7.25% statutory maximum premium rate be maintained for 2008.

The Uninsured Employers' Fund (UEF) had higher revenue than projected primarily due to higher than expected investment returns and an increase in penalty collection from uninsured employers. The disbursements were lower than projected which left a positive \$4.3 million cash flow for 2007. The current fund balance exceeds the minimum fund statutory requirement and the current projected liabilities. Based upon this information, they are recommending that the Commission maintain the .25% premium rate for 2008, but if penalties continue to stay high, future decreases may be warranted.

MOTION: David Bird moved that the Council recommend to the Commission that the premium rate for the ERF be maintained at 7.25% and the premium rate for the UEF be maintained at .25%. **Tom Bingham** seconded the motion which passed unanimously.

3. Grant Applications -

Joyce Sewell explained that during the grant application process, one application had been discussed which the Workplace Safety Committee felt should be addressed by the entire Workers' Compensation Advisory Council for consideration as it did not fall within the general guidelines used to award grants by the committee. She asked **Dr. Scott DeBerard** from Utah State University to explain his grant request.

Dr. DeBerard distributed information detailing his grant application, which involved a low back pain study among Utah workers' compensation patients. He explained that low back pain is the single most costly medical condition for Utah workers' compensation system. He felt there was a need to understand why some people respond successfully to pain interventions and other cases become perm totals. He said that rates of spine surgery are continuing to increase drastically and new procedures are often more expensive than older procedures. He felt the state should monitor outcomes of these newer procedures in an effort to make some prudent utilization decisions. He said the studies he was proposing, using Workplace Safety grant money, would provide a mechanism for doing so. **Dr. DeBerard** was asking for \$29,500 to fund this study.

Dr. Edward Holmes and Dr. Alan Colledge both spoke in favor of having the Workplace Safety Fund award the requested grant for this study. They felt the money would be well spent in providing evidence-based science concerning low back surgery.

Senator Ed Mayne brought up the issue that the Workplace Safety Fund grant monies were being asked more and more frequently to fund worthwhile projects which had nothing to do with actual workplace safety. **Mr. Bird and Mr. Olsen** agreed with that that statement, adding that the grants were not set up to address injuries after they occur. **Mr. Kelm** added that the study had great merit, but did not link to workplace safety.

The actual statute addressing the disbursement of Workplace Safety Fund grant money was researched and read to the Council. The words “safety programs or other initiatives” were debated as to whether or not this grant application would fall within the statute. Other sources of funding were suggested to Dr. DeBerard as well, including the Robert Woods Foundation.

Ms. Atkin suggested the item be tabled until the next meeting of the Workers’ Compensation Advisory Council.

MOTION: Mr. Bird moved to table the item until the next meeting and to have the Workplace Safety Coordinator prepare information outlining all grants which had been funded in the last few years and mail that information out to the Council. **Mr. Kelm** seconded the motion which passed unanimously.

3. Proposed Legislation -

Update on Social Security Offset: Mr. Hennebold explained this would amend the law on social security offsets against disability benefits. He said Sen. Hickman was interested in this issue and was still considering it at this time.

Dependent Benefits: Mr. Hennebold told the Council they had before them information regarding this issue and that representatives from the Adjudication Division were here to address any questions. He asked **Judge LaJeunesse** to give a brief synopsis of the proposed legislation. **Judge LaJeunesse** reminded the Council that this issue had been discussed previously before them. He said the purpose of this legislation was to bring death benefits more in line with regular workers’ compensation benefits and get the Adjudication Division out of the management of those types of benefits. There were two components involved:

- 1) Eliminate the Adjudication’s administration of trust accounts and return them to the hands of custodial parents or legal guardians. He reported this had nearly been accomplished, having gone from 290 of those types of accounts down to just 11.
- 2) Make a statutory change so the Division is not monitoring and adjusting death benefit accounts on a yearly basis. Currently the Division reviews every death benefit case annually and then issues an order, which now amounts to over 400 cases. If the statute was amended, information would go directly to insurance carriers where they could continue to pay and/or make adjustments accordingly. In the event of a dispute or problem, Adjudication could then still be asked to review those cases, but standard annual review would not be mandated.

MOTION: Mr. Bird moved to recommend the Commission accept the proposed legislation and forward the language to Legislative Research to be prepared as a draft. The bill will then be reviewed by the Council prior to the Legislative Session. **Ms. Atkin** seconded the motion which passed unanimously. **Sen. Mayne** will sponsor that legislation following review of the draft.

Retaliation Committee Report: Ms. Sewell reminded the Council a Retaliation Committee had been formed following discussion at a previous Council meeting. This Committee was to address issues of employer retaliation against employees who file workers’ compensation claims based upon a case filed by employees at La-Z-Boy. This case is currently making its way through the court system.

The Committee did meet and felt this was a very complex issue. They debated about making statutory changes, or whether that would not be the best idea. It is still under discussion and they are still following the case through the system. They currently have an intern researching statutes from other states as well for the Committee to summarize and provide recommendations to the Council.

There was one issue that the Retaliation Committee did agree should be amended at this time. It concerned employers who are currently paying their claims directly when they are not authorized to do so, and then failing to report the injury to the Commission and their insurance carrier. By statute, the only employers who are legally able to pay these kinds of claims directly are the self-insured employers who receive permission from the Commission, or uninsured employers who are required to do so because they do not have workers' compensation insurance coverage.

Therefore, the Retaliation Committee felt it was appropriate to bring to the Council proposed legislation which imposes penalties on employers who pay claims directly. The penalty would be imposed following a notification after their first offense if they proceeded to do it again. The first penalty would be \$1,000, and if additional medical bills were paid, the penalty could increase up to \$5,000. Any money generated from these penalties would go into the Uninsured Employers' Fund. **Ms. Sewell** stressed the importance of filing the claim with the carrier and the Commission to document all injuries and protect employees in the event it was necessary to prove the injury occurred.

The Council suggested the language be revised by deleting "directly" on line (3) and "a minimum off" on the third line of (3). Language should also be added to specify any penalties collected would go directly into the Uninsured Employers' Fund

MOTION: Mr. Bird moved to advise the Council to accept the proposed legislation and forward the language to Legislative Research to be prepared as a draft with the changes in language as noted above. The bill will then be reviewed by the Council prior to the Legislative Session. **Mr. Olsen** seconded the motion which passed unanimously. **Sen. Mayne** will also sponsor that legislation and open a file following review of the draft.

5. Attorney Fee Rule Status Report -

Ms. Sewell explained that **Mr. Houpt** who Chaired the Attorney Fee Committee, had another commitment and asked **Dawn Atkin** if she would review the status report and recommendation. The committee consisted of: Tim Houpt as Chairman, Dawn Atkin, Jinks Dabney, Scott Squire, Jan Moffat, Mark Dean, and Joyce Sewell. Christy Larsen was also an official member of the committee, but had only attended two meetings.

Ms. Atkin began her explanation by directing the Council to the last page of the handout. This consisted of the Appointment of Counsel form. She said the Committee felt the current wording of the paragraph on the form had been demeaning and the Committee rephrased the wording to very typical terminology. **Ms. Atkin** said the Committee was unanimous about this change.

MOTION: Mr. Bird moved to recommend the Commission adopt the Appointment of Counsel form revision language. **Mr. Molton** seconded the motion which passed unanimously.

Ms. Atkin then discussed "Exhibit B" of the handout which addressed Rule R202-2-6, Reimbursable Expenses, Fees & Costs. This clarifies what reimbursable costs are and gives guidelines. It does not make a change, just a clarification.

MOTION: Mr. Bird moved to recommend the Commission continue through the rulemaking process with the clarifications concerning reimbursable expenses found in R202-2-6 as proposed. **Mr. Astorga** seconded the motion which passed unanimously.

Ms. Atkin then discussed "Exhibit A" of the handout. This addresses adjustment of the attorneys' fees. She explained that difficult cases which involve high dollar amounts are becoming much more complicated and difficult to handle, and the attorneys' fee was not reflecting that. An additional problem involves the smaller cases which are becoming more difficult to handle and did not have

equitable attorneys' fees. **Ms. Atkin** said this had been a very difficult issue for the Committee to discuss for both defense counsel and applicant's attorneys. At the last committee meeting, a compromise position had finally been reached following an 18 month work period.

The Committee was unanimously proposing the following changes to R602-2-4:

A. For all legal services rendered through final Commission Decision, the fee shall be 25% of the weekly benefits generated for the first \$25,000, plus 20% of the weekly benefits generated in excess of \$25,000 but not exceeding \$50,000, plus 10% of the weekly benefits generated in excess of \$50,000 to a maximum of \$15,250.

B. For legal services rendered in prosecuting or defending an appeal before the Utah Court of Appeals, they were proposing awarding 30% of the benefits in dispute at the Court of Appeals, to be added to the amount of attorneys' fees awarded in paragraph (A) for benefits not in dispute at the Court of Appeals; not to exceed \$20,000.

C. For legal services rendered in prosecuting or defending an appeal before the Utah Supreme Court, they were proposing awarding 35% of the benefits in dispute before the Supreme Court, plus the amount of fees awarded in (A) and (B), for benefits not in dispute at the Supreme Court; not to exceed \$27,000.

Ms. Atkin said that there was an amendment to this consensus also being considered which would raise the limit in (B) Court of Appeals cases to \$22,000. As it had not been discussed with the entire committee yet, the change was not reflected in the proposed rule before the Council.

Mr. Bird pointed out that these increases will not affect employers, but will be directly absorbed by claimants as an amount they pay from their award.

Mr. Hennebold reminded the Council that as it is the claimants who will be paying the bill, those who have more simple cases will end up subsidizing fees for those you have more difficult cases.

Ms. Atkin stated that this change will provide a balance and allow competent attorneys to vigorously represent claimants in workers' compensation cases.

Sen. Mayne encouraged the Council to go forward with this rule as proposed by the Committee. He said there has been a large decline over the years in the number of attorneys who will handle workers' compensation cases because of the low fees associated with them.

MOTION: Ralph Astorga moved to recommend to the Commission that they adopt the Rule change as proposed by the Attorney Fee Committee. **Mr. Kelm** amended that the amount of \$20,000 for Court of Appeals cases be changed to \$22,000 as discussed by the Committee, and a cost of living adjustment be made to the Rule as well. **Mr. Astorga** accepted that amendment as part of his motion.

SUBSTITUTE MOTION: Mr. Bird moved the Council table the issue and move on to the next agenda item. He did not want to amend the proposed rule without having the consensus of the entire Attorney Fee Rule Committee. **Mr. Olsen** seconded the motion.

Ms. Atkin asked the Council not to table the item. She said the Committee had worked on this issue for 18 months and brought a proposal before the Council. The Committee had finished their work and would not be meeting to discuss this issue again in the near future.

Mr. Bird withdrew his substitute motion.

Mr. Kelm withdrew his amendment concerning the COLA for the attorneys' fees. The original MOTION was then before the Council which included the Rule as proposed with the change to raise the cap to \$22,000 in Court of Appeals cases. The motion passed unanimously.

6. Overtime Pay Premium Decision – Brad Tibbetts, Insurance Dept.

The Utah Insurance Department was proposing that the current system for addressing overtime in the reporting of payroll should be departed from in favor of NCCI's rule regarding the treatment of overtime. NCCI stipulates that the extra pay for overtime is excluded from payroll in which the premium is calculated. Mr. Tibbetts said this had been discussed with representatives from the Utah Food Industry, Utah Manufacturers, Utah Restaurant Assn. and Presidio Insurance Group.

Considering the information provided by NCCI, along with consensus of the participants in the discussion, the Insurance Department was recommending that they depart from the current system and adopt the National NCCI rule of reporting all payroll hours as straight time.

MOTION: Mr. Bird moved to advise the Labor Commission to recommend that the Insurance Department depart from the current system and adopt the National NCCI policy of reporting all payroll hours as straight time. **Mr. Kelm** seconded the motion which passed unanimously.

7. Report/Discussion on King Decision – Jim Olsen

Mr. Olsen told the Council that language was currently being drafted by Legislative Research to address the situation of when an injured worker with a temporary disability is released for light duty, but cannot return to work because of incarceration, and is collecting both medical and wage benefits. This legislation would entitle the injured worker to the medical benefits, but would not entitle them to wage benefits when the work opportunity was there, but they are unable to return to work because of incarceration or other reasons. The proposed bill will be available as an agenda item for the next meeting.

8. New Business

The next meeting of the Council will be held in early December. Dates will be suggested and the Council will be asked for input.

Mr. Hennebold adjourned the meeting at 2:20 p.m.